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Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioners

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No.

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v.

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Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction of each petitioner by the United States District Court for the Western District of Kentucky for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 24, *infra*) is unreported. The opinion of the District Court in the *Rowton* and *Wheeler* cases is reported (130 F. Supp. 189). [RR 83a; RW 62a] [1] The *Stepp* opinion is unreported. [RS 29a]

[1] Numbers herein within brackets preceded by "RR" refer to pages of printed record in *Rowton* case. Numbers herein within brackets preceded by "RW" refer to pages of printed record in *Wheeler* case. Numbers herein within brackets preceded by "RS" refer to pages of printed record in *Stepp* case.

JURISDICTION

The judgment of the Court of Appeals was entered in each of these cases on January 10, 1956. (See Appendix B to this petition, page 27, *infra.*) A petition for rehearing was filed and denied on March 7, 1956. (See Appendix C to this petition, page 27, *infra.*) The time for filing this petition for writ of certiorari expires April 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Since the regulations deny the help of legal counsel before the local board but guarantee, in lieu thereof, assistance to registrants by local board advisors, did the local boards deny petitioners procedural due process of law and invalidate each order to report for civilian work in each case by not informing petitioners of the right of assistance by advisors through posting the names of advisors to registrants conspicuously in the local board office as required by Section 1604.41 of the Selective Service Regulations?

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) reads:

> "Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at

least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

STATEMENT OF THE CASES

Facts in Rowton Case

Rowton was born on March 28, 1929. He filed a classification questionnaire with Local Board No. 62 at Paducah, Kentucky, on October 10, 1948, showing that he was a student preparing for the ministry. [RR 30a, 31a-32a] He answered that he was doing ministry work part time. [RR 32a] He was graduated from high school. [RR 33a] The conscientious objector blank was signed. [RR 33a] The local board sent him a conscientious objector form. [RR 34a] Rowton returned it. The local board classified him as a conscientious objector. [RR 34a]

Thereafter Rowton, on November 28, 1951, was reclassified I-O. This conscientious objector classification made him liable to perform civilian work to be selected by the local board. [RR 34a]

He requested a personal appearance. [RR 34a] The local board notified him to appear for a personal appearance on December 17, 1951. [RR 34a-35a, 37a] Rowton appeared before the local board on December 17, 1951. [RR 9a] He filed a statement supporting a claim for exemption as a minister. This was accompanied by a certificate of the Watch Tower Bible and Tract Society. [RR 37a-40a, 40a-41a] On December 27, 1951, Rowton filed three additional affidavits. [RR 42a-45a]

He was denied his claim for exemption as a minister so he appealed his case to the appeal board. [RR 45a] He took a physical examination and was found acceptable. [RR 47a-48a] On February 27, 1952, the appeal board classified Rowton in Class I-O. [RR 35a, 46a] He was notified of this classification. [RR 35a]

Rowton attempted to get a reopening of his classification because of a change in status as a minister of religion. He submitted to the local board a certificate that he was authorized to perform the marriage ceremony under the law of Kentucky. [RR 52a-53a] The local board refused to reopen the case. [RR 35a-36a]

The testimony of the clerk of the local board showed that the local board never had complied with the law about advisors to registrants. No notice of the names and addresses of any was posted. [RR 25a-26a] The clerk testified that only if the registrants requested the help of advisors to registrants did she give them the names and addresses of advisors, and then orally. [RR 26a] The petitioner Rowton discovered that there were no advisors posted when he went to the local board, at the instance of his counsel, during the week of the trial. [RR 14a, 25a-26a]

Rowton was ordered to report for civilian work on June 8, 1953. [RR 36a] He reported to the Western State Hospital at Hopkinsville, Kentucky, but refused to do civilian work. [RR 82a-83a] Thereafter he was indicted and prosecuted for such refusal. [RR 1a, 3a-4a]

Facts in Wheeler Case

Wheeler was born on January 6, 1928. He filed his questionnaire with Local Board No. 62, Paducah, Kentucky, on October 10, 1948, and showed he was a student preparing for the ministry. [RW 23a-24a] He answered that he was employed by the Illinois Central Railroad. [RW 24a] He was graduated from high school. [RW 25a] He signed the conscientious objector blank. [RW 26a] The board mailed him a conscientious objector form. [RW 27a] He returned it and was classified as a conscientious objector. [RW 27a]

Thereafter Wheeler was classified I-W, which made him liable for the alternate civilian work as a conscientious objector. He wrote the local board for a personal appearance. [RW 27a] The request was granted and he was notified to appear on December 17, 1951. [RW 27a] He appeared

before the local board on December 17, 1951, and gave evidence. [RW 27a] Following the personal appearance he was reclassified I-O and notified thereof. [RW 27a]

The testimony of the clerk of the local board showed that the local board never had complied with the law about advisors to registrants. No notice of the names and addresses of any was posted. [RW 17a-18a] The clerk testified that only if the registrants requested the help of advisors to registrants did she give them the names and addresses of advisors, and then orally. [RW 17a-18a] The petitioner Wheeler discovered that there were no advisors posted when he went to the local board, at the instance of his counsel, during the week of the trial. [RW 10a, 18a]

Wheeler appealed his case to the appeal board. [RW 31a] He was classified I-O by the appeal board on February 27, 1952. [RW 32a] He was ordered to report for a physical examination and was found to be acceptable on February 3, 1952. [RW 32a-33a]

On April 23, 1953, Wheeler was ordered to proceed to the Central State Hospital at Lakeland, Kentucky, on May 5, 1953, to do civilian work. He reported at the hospital but refused to do work. [RW 28a, 60a] He was thereafter indicted and prosecuted. [RW 1a, 3a-4a]

Facts in Stepp Case

Stepp was born on February 11, 1932. [RS 15a, 19a] He filed a classification questionnaire with Local Board No. 15, Hopkinsville, Kentucky, on February 26, 1951. [RS 15a] He showed that he was a student preparing for the ministry. [RS 17a] His secular employment was that of a termite exterminator. [RS 17a-18a] He certified that he was a conscientious objector to war. [RS 19a] The local board sent the conscientious objector form to him which he returned and filed. [RS 20a] The local board classified him as a conscientious objector. [RS 20a] His classification was I-O. [RS 20a] This classification made him liable for

the performance of civilian work in lieu of induction into the armed forces. [RS 20a]

Stepp appealed by mail. [RS 20a] The appeal board referred the case to the Department of Justice for an appropriate inquiry, hearing and recommendation. [RS 20a] The appeal board, following the receipt of the recommendation, classified Stepp as a conscientious objector, placing him in Class I-O.

The local board, on December 3, 1952, ordered Stepp to report for civilian work. [RS 21a] Stepp reported at the local board on December 15, 1952, as required, but failed to report to the Kentucky State Hospital as directed by the board. [RS 21a] Because there were irregularities in the designation of the place of civilian employment the State Director ordered the local board to start the civilian work procedure all over again. [RS 21a]

On September 29, 1953, the local board ordered Stepp to report at the local board and proceed to the Waverly Hills Sanitorium, Waverly Hills, Kentucky, on October 9, 1953, for the performance of civilian work. [RS 24a-25a] Stepp did not report at the hospital for civilian work, although he did show up at the local board to state that he had not changed his mind about his refusal to do work. [RS 23a] Thereafter Stepp was indicted and prosecuted for such refusal to do civilian work. [RS 1a, 4a-5a]

The chairman of the local board testified that he never heard of an advisor to registrants. [RS 9a] He testified that the board had an appeal agent but not an advisor to the registrants. [RS 8a-9a] He said positively that at no time did the board ever have posted the names and addresses of advisors to registrants. [RS 9a] The chairman of the board testified on cross-examination that when the local board did not satisfy the registrant, then the registrant was referred to the government appeal agent. [RS 8a, 9a, 10a]

Stepp testified that when he reported to the local board for a physical examination on September 2, 1952, there

was not posted the name and address of an advisor to the registrants. [RS 11a, 20a-22a] Stepp later, on October 25, 1954, a few months before his trial, went to the local board. He took along with him his wife, Mary Lou Stepp. They talked with the clerk, Miss Hardin, about whether there were advisors to registrants. [RS 11a-12a] Miss Hardin, the clerk, said: "Maybe you mean the appeal agent." So the clerk at this time gave the name of the appeal agent to Stepp. This was the first time that Stepp was advised of the government appeal agent (who was not an advisor to the registrants contemplated by the regulations). Stepp did not see posted the name of the government appeal agent. [RS 12a] The clerk told Stepp that the appeal agent was probably in Florida because that was where "he spent most of his time." [RS 12a] After searching the walls for the names and addresses of advisors to registrants Stepp and his wife left on October 25, 1954. [RS 12a-13a]

The chairman of the local board testified that, as a result "of his conference with the—your appeal agent," Stepp did not take an appeal. [RS 10a] This was true because this was on October 25, 1954, three years after the case was forwarded to the appeal board on November 7, 1951, and over two years after the appeal board had classified him on June 24, 1952. [RS 20a]

REASONS FOR GRANTING THE WRIT

The court below has decided a question that is in direct conflict with a decision by the Court of Appeals for the Ninth Circuit. (See *Chernekoff* v. *United States,* 219 F. 2d 721 (1955). Compare *Uffelman* v. *United States,* No. 14,780, 9th Cir., Jan. 27, 1956, which is distinguished. There it appeared appellant had assistance of counsel before the board.) The record in the *Rowton* case [RR 20a-25a; RW 13a] shows a small man who was an attorney was denied the right to enter and help Rowton on his personal appearance. The other petitioners were not specifically denied the right to have counsel enter because they did not request it.

The holding is also out of harmony with what this Court held in *Simmons* v. *United States,* 348 U. S. 397, at page 406. (See the quoted part of that opinion at page 14, *infra.*) The holding is also in conflict with *Kotteakos* v. *United States,* 328 U. S. 750, at pages 760-761. For these reasons the writ should be granted.

Whether a denial of procedural due process of law by a local board that fails to advise a registrant of his right to assistance through counsel of the advisors to registrants by not posting notice of the names and addresses of such advisors is an important question which is shown in the conflicting decisions by the district courts on the question. *United States* v. *Dorn,* E. D. Wis., 121 F. Supp. 171 (1954), is typical of several cases holding that failure to give notice of help of advisors is not a denial of due process. *United States* v. *Giessel,* D. N. J., 129 F. Supp. 227 (1955); *United States* v. *Jasmagy,* N. D. Cal., 132 F. Supp. 547 (1955); *United States* v. *Kariakin,* S. D. Cal., No. 23221-PH, Jan. 12, 1954; *United States* v. *Scott,* E. D. Wis., 137 F. Supp. 449 (Feb. 1, 1956); and *United States* v. *Schwartz,* E. D. N. Y., — F. Supp. — (March 15, 1956), held to the contrary or that failure to give notice of names and addresses of advisors to registrants is fatal to draft board orders as a denial of procedural due process of law. See the marked portions of the copies of the unreported decisions by the district courts that are in an envelope accompanying this petition as Appendix D.

This petition presents, as will be hereafter shown, a most important question of federal criminal law which has not been, but which ought to be, reviewed by this Court. The denial of advisor-help by failure to give notice of the right thereto, where help of lawyers is denied, is of wide public or national importance.

The problem is not temporary or limited to just a few cases. There are about four thousand local boards with whom millions of registrants have their cases. Several hun-

dred of these boards have failed to comply with the regulation requiring giving notice of the right to counsel of advisors. Several hundred thousand or millions of registrants are affected by the question here presented.

About six million out of the sixteen million registrants under the Act are entitled to make claims for deferment or exemption from training and service fixed by Congress. A large percentage of these persons are uneducated and few, if any, are skilled in how to properly present and handle their claims before the local boards in this highly complicated field of administrative law, full of technical pitfalls for the registrant. The denial of help by lawyers before the boards has made even more necessary and important the help of the advisors to registrants required by the Selective Service Regulations.

The liberality of the procedural requirement for registrants in making their claim by not penalizing them for not dotting their i's and crossing their t's does not make up for denial of proper advice and assistance in making statements supporting their claims for deferment or exemption. Some affirmative assistance must be given to the registrant so that he can carry the burden placed on him to file papers proving his claim, in order that the rights to exemption and deferment are protected as meant by the Congress that provided for the deferment or exemption.

This help was intended by the regulations to come from the advisors provided by law. Without the help of advisors intended by the law, hundreds of thousands, if not millions, of registrants have been and will continue to be injured. Unless the local boards comply with the law by giving notice of the right to the help of advisors, such right to assistance guaranteed by the regulations is neutralized if not wholly nullified. For the right to mean anything the local boards must inform the registrants in the manner provided by law, which is posted notice.

The inherent nature of the right and the broad scope

of registrants affected by the denial of the right, running into the hundreds of thousands or perhaps millions, make it appear that the problem presented here is not only substantial but is also of great and wide public importance.

During the last decade this Court has granted certiorari and determined scores of cases involving convictions in judicial proceedings where the trial judges failed to advise defendants in criminal cases about their constitutional right to have assistance of lawyers in their trials. In each case the question was considered of great public importance so as to call for granting the writ in all of the cases. The situation in these cases is identical and is equally important. There was a smaller group of persons involved in that line of cases. The administrative failure to give notice of the right to counsel in these cases involves millions of persons.

While there is no constitutional guarantee of the right to counsel in these cases, the regulations do secure the right to assistance of counsel of advisors and also specifically provide that each registrant be notified of the right. Due process of law guaranteed by the Sixth Amendment, therefore, requires in these cases that the assistance guaranteed by the regulations be allowed, or at least that notice thereof be given in the manner provided by law.

It can be seen from this that the Court here has presented to it the identical problem in administrative law that was presented in the scores of cases in judicial proceedings, where it granted writs and where counsel was denied or notice of the right thereof not given in judicial proceedings the same as in these administrative proceedings. Since the problem is identical to that presented in those cases and affects a larger number of persons, it must be seen that it is nationally important enough here in these cases to require the granting of the writ of certiorari.

The court below committed substantial error to the prejudice of petitioners when it held that the failure to comply with the regulation requiring the posting of the names of

advisors to registrants by the local board was a mere technicality and not a denial of procedural due process of law.

All procedural law is "bare technicality." Some of the greatest rights cherished by man are also "bare technicalities." But they are written into the Constitution! This the founding fathers did to prevent prosecutors and judges from taking the rights away from the people by calling them bare technicalities.

An idle waste of time it would be to cite the legion of cases that guarantee the right of litigants, especially defendants in criminal cases, to be represented by counsel. Due process of law requires the appointment of counsel. Those who believe that a defendant entitled to counsel is guilty always say that the failure to appoint counsel is a "bare technicality." But such name calling or the treating of constitutional rights as a mere shell has been condemned. Within the past fifty years scores of convictions have been set aside and judgments declared void on a writ of certiorari in habeas corpus cases because of the failure of judges to observe the command of such "bare technicality."

The multitude of cases invalidating convictions for failure to appoint counsel establish a principle that applies in each of these cases. And it cannot be ducked by the court below through the device of misnaming the substantial right a "bare technicality." The court below has held that the law does not guarantee a registrant the right to be represented by a lawyer in the local board proceedings. (*Peterson* v. *United States*, 6th Cir., 173 F. 2d 11 (1949); cert. denied 337 U. S. 925; see also *United States* v. *Pitt*, 3rd Cir., 144 F. 2d 169 (1944)) In lieu of the right to counsel the regulations have specifically guaranteed the right of assistance by advisors to registrants.—32 C. F. R. § 1604.41.

Assistance by advisors in the preparation of papers is a substantial right. The Court should know that millions of unlearned men need assistance in this highly complicated field of administrative law. Without help from advisors

they are lost in a sea of confusion. The same injurious result, therefore, occurs from the denial of assistance by advisors to registrants as flows from the denial of counsel in judicial proceedings. Yet, in spite of this manifest parallel in the denial of due process, the court below has erroneously held that it is harmless. And that because it is a "bare technicality!" So what? Also is the denial of the right to counsel in judicial proceedings a "bare technicality." The denial of that technicality in a judicial proceeding is denial of due process. By force of the same reason, the denial of the similar technicality in this is also a denial of due process.

The court below said that petitioners defied the law. This is irrelevant. The law gives the registrant the right to defy a draft board order. He can challenge its validity when he is prosecuted for a disobedience of the order. (*Estep* v. *United States,* 327 U. S. 114 (1946); *Dodez* v. *United States,* 329 U. S. 338 (1946)) When it is made to appear, as here, that the draft board has flouted a procedural regulation, the defiance of the order is not unlawful. (*Dickinson* v. *United States,* 346 U. S. 389 (1953); *Gonzales* v. *United States,* 348 U. S. 406 (1955); *Davis* v. *United States,* 6th Cir., 199 F. 2d 689 (1952)) Confronted by this law it is exceedingly difficult, if not impossible, for one to reconcile the following statement of the court below: "In the face of consequences brought about by such defiance, appellants seek to escape punishment by reliance upon a bare technicality to show denial to them of procedural due process of law." (See page 26, *infra.*) This statement of the court below seems to disregard the holdings contrary to it. The above-cited decisions show that a registrant has the right to defy a draft board order when the board has flouted the regulations.

The court below committed reversible error to the prejudice of petitioners when it held that the record failed to show prejudice to the petitioners through the admitted denial of procedural due process by the local boards in

failing to post the names of advisors in the manner required by law.

The court below has found that the local boards did not comply with the law. But the court said that there was no showing of harm to petitioners from the failure to comply with the law. The court says that "nowhere in the record" do appellants show harm from the failure to comply with the law.—See page 26, *infra*.

The short answer to this holding is that the law does not require a showing of harm. The court misconceived the burden of proof in this case. It failed to see that the record showed petitioners complied with the burden. All that the petitioners had to show is what they did show: that the regulation had been violated. Then the burden shifted to the Government to prove by affirmative evidence that they were not harmed. The Government did not come forward with any proof of no harm, as indeed it could not. Harm must be conclusively presumed where there is a conceded violation of the regulations.

To overcome this basic failure of proof by the Government the court below indulged in speculation by saying that the petitioners were not harmed by the failure to post the names of advisors, as required by the regulations. How can it be said that better and more convincing papers would not have been submitted if the petitioners had had the help of advisors? Who knows whether they might have proved a prima facie case of exemption as ministers of religion, had they been given the required help? Perhaps the board would have classified them as ministers. How can the court below, in the absence of affirmative proof from the Government, say that it would have done no good for petitioners to have the help of advisors? The burden was on the Government to show affirmatively facts giving basis for the conclusion the Court below reached through speculation, without any support in the record.

The error of the conclusion reached by the court below can be easily shown by an analogy. Suppose that a defend-

ant were charged with murder. Assume that he were indigent and the trial court failed to advise him of his right to counsel and did not appoint counsel. Let it be said that the undisputed evidence showed the defendant guilty of murder. Then let us consider that the case is before this Court on review by appeal. Could it be said that, though the defendant were guilty, as a matter of law the failure to appoint counsel for him was a "bare technicality" and that "nowhere in the record" did the murderer "actually show" that failure to appoint a lawyer "worked" to his "prejudice in any manner"? Or would the fact that the trial court allowed the defendant in such a hypothetical case to offer all the evidence he wanted to produce cure the failure to appoint counsel? The mere asking of these questions loudly resounds the admitted answer, No! The identical situation exists in these real cases now before this Court. Yet, strangely, the court below reached the directly opposite result.

In *Simmons* v. *United States*, 348 U. S. 397 (1955), at page 406, the Court said that, when a draft board violated the regulations fixing a precise procedure to be followed, it was not necessary to "specify the precise manner in which he would have used the right—and how such use would have aided his cause—in order to complain of the deprivation." Yet the court below on a very similar situation here held just to the contrary.—See also *Gonzales* v. *United States*, 348 U. S. 407, reversing the court below in 212 F. 2d 71; and *Kotteakos* v. *United States* 328 U. S. 750, 760-761.

It is difficult—if not impossible—to see any consistency between the holding by the Court of Appeals that it is necessary to show harm, in addition to the violation of the regulations in these cases, and its failure to hold so in a similar situation involving violation of different regulations. (*Bejelis* and *Walker* v. *United States*, 6th Cir., 206 F. 2d 354 (1953); *Davis* v. *United States*, 6th Cir., 199 F. 2d 689 (1952)) In all three of these cases a procedural regulation prescribing the conduct of the local board was

considered. In none of them did the record affirmatively show harm, nor did the court below hold that it was necessary to prove harm or prejudice to the appellant.

It is fundamental that, when a violation of a procedural right is established, harm is presumed. And it is unnecessary, moreover, for the person showing the violation to show any affirmative evidence of injury.

There is a great difference between the scope of review for the purpose of upsetting a classification by a draft board and the scope of review of the determination of some other administrative agency. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U. S. 114, 123 (1946).) Notwithstanding this limitation placed on the judicial review of a classification, the fact remains that procedural due process of law must be strictly adhered to. In fact, the rule is stated in *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 98 F. 2d 444, 446 (1938), as well as many other cases, that where the scope of review is very narrow and restricted, then the need for an insistence on strict compliance with the procedural regulations must be followed even in draft cases. (See *Ver Mehren* v. *Sirmyer,* 8th Cir., 36 F. 2d 876, 881 (1929), and *United States* v. *Zieber,* 3rd Cir., 161 F. 2d 90, 92 (1947).) These cases hold that there must be a full and strict compliance with the procedural regulations. There are many other cases involving procedural violations that prove this rule. For the final order to be valid the local board must strictly comply with the procedural requirements.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 36 F. 2d 876, 881 (1929); *United States* v. *Zieber,* 3rd Cir., 161 F. 2d 90, 92 (1947); Ex parte *Fabiani,* E. D. Pa., 105 F. Supp. 139, 147-148 (1952); *United States* v. *Graham,* N. D. N. Y., 108 F. Supp. 794, 797 (1952); *Bejelis* v. *United States,* 6th Cir., 206 F. 2d 354, 358 (1953); *Davis* v. *United States,* 6th Cir., 199 F. 2d 689 (1952).

Under the law the petitioners were not entitled to be

represented by counsel before the local board. (*United States* v. *Pitt*, 3rd Cir., 144 F. 2d 169 (1944); *Peterson* v. *United States*, 6th Cir., 173 F. 2d 11 (1949); *Niznik* v. *United States*, 6th Cir., 173 F. 2d 328 (1949)) The right to be represented by counsel is a vital right. The Selective Service Regulations provide for the vital right of assistance of advisors to registrants in lieu of representation by counsel. This right is a very important one.

In order that the right be made legally available it was necessary for petitioners to have notice. The board was required to give notice. This necessary notice was not actual notice. It was constructive or posted notice. Constructive notice when required to be given is actually as important as actual notice. For instance, if a statute requires notice by publication and this notice is not given, then the proceedings requiring such notice are void. Conspicuous posted notice at the board's office would have been necessary to give actual notice to the registrants.

It was illegal for the local board to follow the policy of not posting the notice and then not giving actual notice unless the registrants first requested the names of advisors. Posted or constructive notice by posting the notice of the assistance of advisors conspicuously in the local board's office is the very least that the local board could do in order to make up partially for the denial of legal counsel. It is a violation of due process of law not to give actual notice when it is required by the regulations. (*United States* v. *Fry*, 2d Cir., 203 F. 2d 638 (1953); *United States* v. *Stiles*, 3rd Cir., 169 F. 2d 455 (1948)) Where the statute requires constructive notice or posted notice, then the failure to give that type of notice is equally fatal.

The holding by the trial court in the *Rowton* case about waiver of the right because no request for advisors was made by petitioner is error. [130 F. Supp. 189, 192; RR 88a] The law does not require a request or make it a condition precedent to the posting of the name nd addresses of advisors to the registrants by the local board. It is not a

question involving a request. This is a notice that is required by law regardless of whether there is a request or not.

In another instance it is required of the local board that a registrant be sent a notice of classification, Form 110, following his personal appearance before the local board. The law requires this to be done, and if it is not done and the individual is brought to trial, the failure to send him notice is positive grounds for acquittal. The following authorities are positive concerning this matter when the local board omits this notice required by law: *United States* v. *Stiles,* 3rd Cir., 169 F. 2d 455 (1948); *United States* v. *Fry,* 2d Cir., 203 F. 2d 638 (1953); *United States* v. *Graham,* N. D. N. Y., 108 F. Supp. 794 (1952); *United States* v. *Strebel,* D. Kansas, 103 F. Supp. 628 (1952). No court has ever held that because the registrant did not request notice of classification he waived notice of classification. If a registrant does not waive actual notice, then by force of the same reason he does not waive constructive notice by not requesting it.

The law put the first move on the local board. The local board had to give notice first. It was obliged to give the notice regardless of whether it was requested. This requirement to give notice applies not only when the law requires actual notice but also when the law requires constructive notice. The failure to request the names of the advisors is entirely irrelevant and immaterial. It would be reversing the law and putting the responsibility upon the registrant instead of upon the local board, where the law put it. The rule announced by the court below is in effect a complete repeal of the law requiring constructive notice. If the law required registrants to ask for the names of advisors it would have said that registrants were required to ask for them. Since the regulations do not provide that the registrants must request the names of advisors, then it cannot be written into the law by the district court. The holding of the court was an innovation. The invention was wholly unauthorized. In fact it constituted a repeal of the law.

The cases hold that *de novo* classification by the appeal board does not cure a denial of procedural due process by the local board. (*Chernekoff* v. *United States*, 9th Cir., 219 F. 2d 721 (1955); *United States* v. *Zieber*, 3rd Cir., 161 F. 2d 90 (1947); *United States* v. *Peebles*, 7th Cir., 220 F. 2d 114 (1955); *Mintz* v. *Howlett*, 2d Cir., 207 F. 2d 758 (1953); *United States* v. *Laier*, N. D. Cal. S. D., 52 F. Supp. 392 (1943); *United States* v. *Peterson*, N. D. Cal. S. D., 53 F. Supp. 760 (1944); *United States* v. *Romano*, S. D. N. Y., 103 F. Supp. 597 (1952)) It cannot be said that because an appeal was taken in each case and the appeal board reclassified the registrants the denial in this respect was cured.

The district court below in its opinion [130 F. Supp. 189, 192; RR 88a] attempted to distinguish *Chernekoff* v. *United States*, 9th Cir., 219 F. 2d 721 (1955). The court said that that case involved a I-A classification where the appellant was not given a résumé of the adverse information. That part of the *Chernekoff* opinion dealing with failure to give a résumé of the adverse information related to the procedure in the Department of Justice after the case had reached the appeal board. The failure to post the notice of names of advisors in the local board had no relevance at all to that question. When the Department of Justice failed to give a summary Chernekoff had only had his hearing in the local board and had only taken an appeal. The Court of Appeals in the *Chernekoff* case did not attempt to base its holding on the failure to post names of advisors on the happenings in the appeal board after Chernekoff was entitled to notice of advisors. Chernekoff was entitled to have advisors while his case was before the local board and not the appeal board. The court held that he had been denied procedural due process because he was improperly advised before the local board. The attempt to distinguish the *Chernekoff* case by the court fails.

The district court below in *United States* v. *Rowton*, 130 F. Supp. 189, 192 [RR 89a], cites *United States* v. *Fry*, S. D. N. Y., 103 F. Supp. 905 (1952). This decision was

reversed in *United States* v. *Fry*, 2d Cir., 203 F. 2d 638 (1953).

Notice required in law is *notice*. Constructive notice or posted notice is no less a requirement than actual notice. When posted notice is required to be given there must be actually as strict a compliance with this requirement as when actual notice is given.

The district court stated in the *Stepp* case that there was "no evidence in this record that the defendant at any time sought the counsel or advice of an advisor to registrants or that he could have profited from it." [RS 31a] The court then goes on to hold that he had the assistance of certain ministers in the congregation of Jehovah's Witnesses at Hopkinsville in the preparation of his questionnaire and his conscientious objector form. [RS 31a] The court then says that Stepp took no interest in an advisor to registrants until a few days before trial. [RS 31a-32a]

The fact that Stepp may have had some assistance from lay advisors and ministers of Jehovah's Witnesses in no sense of the word excuses the board from doing its duty. The law required the board to post the names and addresses of advisors to registrants. The fact that some layman may have assisted Stepp was not equal to the posting of names of advisors to registrants. That Stepp went to the board to make sure that they did not have posted the names of advisors to registrants a few weeks before his trial is in no way relevant. It merely proves that the local board, as testified by the chairman at the trial, did not have posted the notice required by the regulations.

The court says that Stepp "did not seek and apparently did not desire" at the time his case was before the local board the assistance of advisors to registrants. [RS 32a] It was not necessary for him to seek or desire the assistance of advisors to registrants at that time. The issue is not whether he requested, needed or desired the help of advisors to registrants. The question of law is whether the

draft board denied procedural due process of law by not taking the step required by law in posting the names of advisors to registrants.

The district court says that Stepp did not prove that "he could have profited" from the posting of names of advisors to registrants. [RS 31a] It is not, as shown above, necessary to prove or show that petitioner was injured by the local board's failure to post notice of names of advisors. When the board violated the express provision of the regulations this was sufficient.

The case here is similar to the denial of counsel in court martial proceedings. The regulation here, like 10 U. S. C. § 1488, is a statutory guarantee of help of counsel. The denial here is the same as the denial of counsel in court martial proceedings.

In *Olvera* v. *United States*, 223 F. 2d 880 (1955), the Fifth Circuit held that there must be a strict compliance by the local board with all procedural requirements. Chief Judge Hutcheson said, among other things, as follows:

> ". . . Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon. (Page 882)
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> ". . . So strongly does this stand out in the four cases just decided, that they may be said to be a new Magna Charta of liberties in conscientious objector cases, a turning back from conviction by administrative absolutism to conviction only in accordance with the tradition of due process and the law of the land for which the Milligan case stands in our jurisprudence like a beacon set upon a hill:

"'• • •The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crime, except in case of impeachment, shall be by jury"; and in the fourth and sixth articles of the amendments. • • •' Ex parte Milligan, 71 U. S. 2, at page 119. (Pages 882-883)

• • •

"When all is said and done, what is in question in these and other like cases is that reconciliation of law with liberty, which distinguishes a government of laws from one of men. Therefore, in construing and applying the Selective Training & Service Act in conscientious objector cases, these things must be kept in mind: (1) the statute under construction is a statute of religious liberty; (2) the blood of the martyrs is the seed of the church; and (3) liberty and law must go hand in hand, neither must outrun the other. (Page 883)

• • •

> "As long, therefore, as the law stands as it is now written and construed, it is and will continue to be of the first importance that the predicate for such conviction without trial by jury be at the least laid with the utmost fidelity not only to every substantial safeguard and right which the law has accorded the objector but also to the procedural requirements compliance with which is essential to the validity of board orders." (Page 884)

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to comply with an administrative order without insisting that this is a measure of judicial convenience, that those who fail to comply with the rule are to be regarded as the "domestic rebels" of medieval times with no rights under the law or Constitution, and that the crime is of such an odious nature that it has worked a forfeiture of even those rights that peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, a right to counsel. It is said that petitioners who refused to comply with the administrative determinations and orders here are nothing more than criminals and do not need counsel of advisors. It may, for the sake of argument only, be conceded that they are such. Are they not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it please the Court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them, and if the guilty have no claim on the rights conferred by these laws, then they are nullities.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work that fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tyrant, and knew what oppression was. It was their mission to protect their people, who were

few and weak, against the many and the strong, and to establish fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such bulwarks as they have.

In conclusion, let this Court consider the words of the New York Court of Appeals in another case involving one of Jehovah's Witnesses. It was stated in the concluding part of the opinion in *People* v. *Barber*, 289 N. Y. 378, 46 N. E. 2d 329, as follows: "We conclude this opinion by a quotation from that brief: 'It may seem to some that appellant's activities were of such a character that, at this critical period in world history, the Courts and the Bar need not be particularly concerned with their repression. . . . Each case of denial of rights to an individual or to a small minority may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to barbarism and the destruction of the essential values of civilized life.'"

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioners

March, 1956.

APPENDIX A

OPINION

(Filed January 10, 1956)

Nos. 12533, 12534, 12565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL EDWARD ROWTON,
Appellant,
No. 12533 v.
UNITED STATES OF AMERICA,
Appellee.

CHARLES FREELAN WHEELER,
Appellant,
No. 12534 v.
UNITED STATES OF AMERICA,
Appellee.

REUBEN JONES STEPP,
Appellant,
No. 12565 v.
UNITED STATES OF AMERICA,
Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided January 10, 1956.

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

PER CURIAM. These cases consolidated for hearing on appeal, were tried separately in the United States District Court for the Western District of Kentucky. Each of the

cases was tried to the court without the intervention of a jury and resulted in a verdict of guilty and a sentence of imprisonment for three years for violation of the Universal Military Training and Service Act of 1948 (50 U. S. C. A. Sec. 462). The first two cases were tried by District Judge Shelbourne and the third by District Judge Brooks. Each of the three cases follows the same pattern of material facts.

Each appellant was classified as a conscientious objector (I-O) by his local board; but each contested that classification, claiming to be a minister and therefore entitled to a classification which would exempt him from induction into the armed forces and from performance of civilian work of national importance. After appealing the local board's decision to the appeal board without avail, each of the three registrants refused to do civilian work in lieu of induction when ordered to do so by his local board.

After their classification as conscientious objectors, Rowton and Wheeler appeared before their respective local boards giving further evidence as to their claimed ministerial status in Jehovah's Witnesses. The local boards ordered the I-O classification retained in both cases. Stepp did not make a personal appearance before his local board to contest the classification, but relied on material in writing which he submitted to support his claim to ministerial status as a Jehovah's Witness. In the Stepp case, the appeal board preliminarily determined that Stepp was not a conscientious objector and referred the case to the Department of Justice. On recommendation of that department, Stepp was classified as a conscientious objector (I-O) by the appeal board.

Appellants were subsequently ordered to report to various state hospitals in Kentucky to perform civilian work of national importance in lieu of induction. Rowton and Wheeler reported to the hospitals designated for them, but refused to work. Stepp refused opportunities given him by his local board to choose the type of work he was willing to do, or the location where he might do it. He informed

his local board by letter and in person that he refused to do any civilian work of national importance in lieu of induction. Separate indictments, trials and convictions of the appellants followed.

The main contention of appellants on appeal to this court is that they were denied procedural due process of law, in that their local boards failed to post the names of advisors to registrants in the local board office as required by Section 1604.41 of the Selective Service Regulations. Appellants claim that this failure invalidates the whole process of their classification, including their orders to report for civilian work, and their subsequent prosecutions and convictions.

Nowhere in the record do appellants actually show that the failure of the local boards to post the names of advisors worked to their prejudice in any manner. Each was afforded ample opportunity to present evidence in support of his claim to exemption from service of any kind due to ministerial status; and each did so. The local boards and the appeal boards decided that appellants were entitled only to the classification of "conscientious objector."

Appellants defied the authority of the United States of America to require that persons, protected in their religious rights as conscientious objectors, be called upon to do work of national importance in lieu of induction into the armed forces. In the face of consequences brought about by such defiance, appellants seek to escape punishment by reliance upon a bare technicality to show denial to them of procedural due process of law.

The failure of the local board to post the names of advisors to registrants as required did not operate to the prejudice of these appellants. [28 U. S. C. A. Sec. 2111; Fed. Cr. Proc. (Titl. 18) Rule 52(a).] They were not denied a fair and reasonable opportunity to present their claims.

The judgments of the United States District Court are affirmed.

APPENDIX B

JUDGMENT

(Same in each case.)

(Filed January 10, 1956)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the jugdment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

(Same in each case.)

(Filed March 7, 1956)

The petition for rehearing is denied.